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In The

Supreme Court of the United States

October Term, 1975

No. 75-270

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KENNETH B. HOLM
GERALD P. LAUGHLIN
MICHAEL G. LESSMANN
DAVID M. PEDERSEN
BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & HAGGART
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500
Attorneys for Petitioners

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

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The petitioners, The School District of Omaha, Owen A. Knutzen, the Superintendent of Schools, and the members of the Board of Education of the School District of Omaha, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 12, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the separate Appendix hereto at pages 100 to 133. The opinion on the merits issued by the United States District Court for the District of Nebraska on October 15, 1974, is reported at 389 F. Supp. 293 (D. Neb. 1974) and appears in the separate Appendix at pages 41 to 98. The opinion on the motion to intervene issued by that same Court on November 27, 1973, is reported at 367 F. Supp. 198 (D. Neb. 1973) and appears in the separate Appendix at pages 34 to 40. The District Court's opinion on the motion for a preliminary injunction issued on October 26, 1973, is reported at 367 F. Supp. 179 (D. Neb. 1973) and appears in the separate Appendix at pages 1 to 33.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 12, 1975. A timely petition for rehearing en banc was denied on July 7, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. In the absence of independent findings of intentional segregation, does the Fourteenth Amendment require a school district to prove that segregative intent was not among the factors motivating its actions upon a mere showing by the plaintiff that racial imbalance in schools is one of the foreseeable effects of the acts or omissions of school authorities?

2. Should a court of appeals establish in the first instance detailed requirements of the plan for the desegregation of a school system in the absence of any record bearing upon the factors such a plan should consider and prior to the parties having had an opportunity to submit evidence or argument on the plan?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in the resolution of this matter are set forth in the appendix attached to this petition: (1) Fourteenth Amendment to the United States Constitution, Section 1; (2) 42 U. S. C. § 2000c-6; (3) 42 U. S. C. § 1983; and (4) Rule 301 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

This suit was instituted on August 10, 1973, in the District Court by the United States of America under 42 U. S. C. § 2000c-6(a). The United States contended that the School District of Omaha, its superintendent, and the members of its Board of Education (hereinafter collectively referred to as the "School District") engaged in racial discrimination in the operation of the Omaha Public School System, in violation of Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. Several black students and their parents were allowed to intervene in this suit pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. They asserted a similar claim for deprivation of their right to equal protection of the laws under 42 U. S. C. § 1983 and the Fourteenth Amendment to the United States Constitution. (The United States and intervenors are hereinafter collectively referred to as "Plaintiffs".)

The School District of Omaha had a total enrollment of 60,502 students for the 1973-74 school year. There were 11,962 students (19.8%) who were black. The boundaries of the school district are not coterminous with those of the City of Omaha. Substantial portions of the city are within School District 66 and the Millard School District.

Segregation of the races within the boundaries of the School District of Omaha has never been mandated by any statute or by any local regulation, policy or ordinance. The basic method of student assignment is and always has been the neighborhood school policy. Since

1940, there has been a rapid expansion of the black population of Omaha from 12,015 (5.3% of the total population) to 34,431 (9.9% of the total population) in 1970. The black population is concentrated primarily in one geographic area of the city, and this concentration is reflected in the racial enrollments of the neighborhood schools serving that area. Despite this concentration, for the 1973-74 school year, 40.6% of black students attended majority white schools and 85.9% of all schools had some black enrollment.

This litigation has focused on certain aspects of the School District's neighborhood school policy and on whether the racial imbalance present in the school system was intentionally caused or maintained by the School District. Following the pattern of school desegregation cases, the Plaintiffs alleged intentional racial discrimination in: (1) the hiring of faculty; (2) the placement of portable classrooms within the district; (3) the alteration of school attendance zone boundaries; (4) the assignment of black faculty; (5) the student transfer policy; (6) feeder patterns for the junior high schools; (7) school construction; and (8) the condition of one particular school, Technical High School.

After a two and one-half week trial, the District Court issued an opinion which held, based on all of the evidence before it from the trial and from the hearing on the United States' motion for a preliminary injunction, that:

> ". . . this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority

students by practicing a deliberate policy of racial segregation.'' (App. p. 97).

The District Court arrived at its conclusion by applying the standard which this Court enunciated in *Keyes v. School District No. 1,* 413 U.S. 189 (1973). The District Court maintained the burden of proof on the Plaintiffs to show that the School District had practiced an intentionally segregative policy. It also recognized that if the Court were to find intent to segregate, it would, as a practical matter, have to infer it from objective actions of the school officials. Finally, the District Court determined that the natural and foreseeable consequences of the School District's actions were one of the factors that should be weighed in evaluating the School District's intent, but that these consequences were not determinative on that question (App. pp. 43-44).

The Court of Appeals, while ostensibly agreeing with this Court in *Keyes* and with the District Court that school desegregation may not be ordered by a federal court unless there is a finding that segregation was brought about or maintained by intentional state action, held that the District Court erred in its placement of the burden of proof on this issue. The Court of Appeals held that the natural, probable, and foreseeable consequences of the School District's actions were not simply a factor which the District Court should properly consider in ascertaining the School District's intent, but rather that a presumption of segregative intent arises once it is established that the School District engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation. The Court of Appeals then held that, once the presumption arises, the burden shifts to the School District to establish that segregative intent was not among the factors that motivated its actions (App. pp. 107-108).

The Court of Appeals concluded that in five of the areas outlined above the foreseeable consequences of School District actions and inactions was to create or maintain segregation and that the School District had failed to rebut the presumption by carrying its burden of establishing that segregative intent was not among the factors motivating its action. Therefore, the Court of Appeals reversed the District Court and ordered full desegregation of the entire school system in accordance with percentage guidelines which the Court of Appeals developed on its own initiative (App. pp. 130-33). The Court of Appeals did not review the District Court's findings under the ''clearly erroneous'' standard of Rule 52(a).

The District Court analyzed the evidence of intent in the traditional fashion, and considered all of the evidence. In contrast, the Court of Appeals considered the evidence in each of the five areas strictly in accordance with its legal standard and the regimen which that standard requires. A comparison of the Court of Appeals' and the District Court's treatment of the evidence is as follows:

I. Faculty Assignment

A. The Court of Appeals

The Court of Appeals held that the presumption of segregative intent arose because, up to and including the

1972-73 school year, a disproportionate percentage of black teachers were assigned to schools having black enrollments exceeding 25% and at the same time, the majority of schools within the system did not have a black teacher (App. p. 112). The Court of Appeals felt that this disproportionate assignment of black teachers had the natural consequence of identifying some schools as black schools. This was sufficient to shift the burden of proof to the School District to show that segregative intent was not one of the motivations for this assignment policy. The Court of Appeals held that the presumption was not rebutted by one explanation offered by the School District for past assignment policies, a belief that successful black adults teaching black children was beneficial to them, because this explanation was constitutionally unacceptable and conflicted with other evidence in the record (App. pp. 112-13).

B. The District Court

The District Court found that through the early 1960's, the School District had a policy of placing black faculty solely in schools with majority black enrollment and placing qualified black secondary school teachers at the elementary school level, but that these policies were dropped in 1963 when the School District began an active and extensive recruitment program for minority personnel (App. pp. 88-90). The District Court concluded that substantial progress had been made in eradicating the effects of the prior policies. An indication of that progress is the fact that the percentage of black teachers at majority black schools as a percentage of the total black faculty dropped from 94.8% in 1963-64 to 56.6% in 1972-73 (the

latest year for which figures were available at the time of trial) (App. p. 89). The District Court weighed the intent of the School District here and found that two factors apparently motivated these prior policies: first, the School District believed that black teachers would have greater success than whites in working with black students; and second, the School District considered having successful black adults as models, especially male teachers at the elementary level, was important for black students. The District Court noted that while it did not pass on the merits of this theory, it found that the School District held the belief in good faith (App. p. 90).

II. Student Transfer Policy

A. The Court of Appeals

The student transfer policy allowed a transfer upon formal request to a school other than the neighborhood school if: (i) the receiving school was not overcrowded, (ii) the student's parents provided the transportation, and (iii) the student's achievement level was at least equal to the average achievement level of the receiving school (App. p. 114). The Court of Appeals held that the foreseeable and actual result of this policy was to increase the segregated nature of almost all the majority black schools since a substantial number of white students assigned to predominately black schools transferred out of these schools in the two years for which there was evidence in the record (App. p. 116). This finding concerning the effect of whites using the transfer policy raised the presumption of segregative intent (App. p. 117). The Court of Appeals concluded that the presumption was not

rebutted since the evidence showed that the School District knew of this white flight (App. pp. 117-18).

B. The District Court

The District Court, while clearly recognizing that white enrollments at all predominantly black schools had decreased as a result of the transfer policy (App. p. 83), also noted that for each of the two school years as to which there was evidence on the effects of the transfer policy, the percentage of all black students in the school district who were enrolled in schools with 80% or more black enrollments decreased and that the percentage of blacks attending majority white schools increased, both as a result of the transfer policy (App. pp. 81-82). Thus, the District Court found both segregative and integrative effects from the policy. The District Court specifically examined the intent behind this policy. It found that the policy was initiated in the fall of 1964 upon the recommendation of a bi-racial committee appointed by the Mayor of the City of Omaha (App. p. 20), that it had been administered in a nondiscriminatory manner so that blacks were granted transfers with the same proportionate frequency as whites (App. p. 83), and that race was not a factor in School District decisions on whether to grant or deny a transfer (App. p. 83).

III. Junior High Feeder Patterns

A. The Court of Appeals

An examination of the opinions below reveals this to be the most complex factual aspect of the entire litigation. The dispute concerns enrollment at the only predominantly black junior high currently in existence, Horace Mann, and at Technical Junior High, which had been closed prior to the filing of suit and was the only other predominantly black junior high in the system. Beginning in the early 1950's, the School District gradually converted to a junior high system, which took seventh and eighth graders from elementary schools and ninth graders from high schools and placed these three grades together in junior high schools. The Court of Appeals held that delaying conversion of some predominantly white elementary schools which would be logical feeder schools for Horace Mann or Technical and granting options to other predominantly white elementary schools which allowed seventh and eighth graders in those schools to attend more distant identifiably white junior highs, had the foreseeable and actual effect of increasing racial imbalance at both of these junior highs, particularly when the policies were combined with the transfer policy (App. pp. 118-20). This raised the presumption of segregative intent. The Court of Appeals held the presumption unrebutted because it did not find the School District's explanation for each of the options or delayed conversions persuasive (App. pp. 121-22).

B. The District Court

The District Court carefully examined each of the delays in conversion and each of the optional attendance zones and concluded that in the context of the overall development of the junior high system, the choices made by the School District were based upon sound administrative reasons (App. pp. 63-67).

Concerning the optional attendance zones, the District Court found that the Mason Elementary students were given an option to attend junior highs other than Technical because of the commercial area and interstate highway construction which impaired access from the Mason attendance zone to Technical (App. p. 66).

It also found no segregative intent in the creation of the option for Walnut Hill Elementary school students since the most natural junior high for these students to attend was not Technical, but Monroe (which was at the time too crowded for any further assignment of feeder schools) and since in the same year the Walnut Hill option was created, the School District created an option which allowed students in a portion of the attendance zone of predominantly black Druid Hill Elementary School, the choice of attending either predominantly black Horace Mann Junior High or predominantly white McMillan Junior High, which option had some integrative effect (App. pp. 62, 65). The District Court also noted that at some point in time, optional attendance zones for junior highs were created for eight elementary schools other than those in question here and that the evidence indicated no significant segregative or integrative effect from these options (App. p. 62). Thus, no general pattern of creation of optional zones to achieve segregation was shown, which taint could be applied to the creation of the Walnut Hill option.

Finally, the District Court found no segregative intent in the creation of the Saunders Elementary School option since: (i) from the inception of the overall plan for converting to a junior high system, at a time when

Technical Junior High would have been either a majority white school (1951) (App. p. 53) or a predominantly white school (1955) (App. p. 54), Saunders was planned to be a feeder school for junior highs which ultimately became Lewis & Clark Junior High (App. p. 66); (ii) the option allowed a choice between the three junior highs whose attendance zones were contiguous to Saunders'; and (iii) in the year the option was created, enrollments were up at Technical Junior High and down at Lewis & Clark (App. p. 66).

The District Court found no segregative intent in the one-year delay in implementing mandatory attendance at Technical Junior High for students at Yates Elementary School, since the conversion was in fact accomplished despite continued parental protest one year later (in 1970) and since the School District, in the very year it granted the delay, attached part of the Webster Elementary School attendance zone to Yates, which caused the percentage of black enrollment at Yates to increase from 2% to 13% (App. pp. 64-65).

The District Court found no segregative intent regarding the failure to convert Sherman and Pershing Elementary Schools to the junior high system and assign their students to Horace Mann Junior High because these two elementary schools were geographically isolated from the remainder of the school district (App. pp. 59-60, 65).

IV. School Construction

A. The Court of Appeals

The Court of Appeals found that 37 of 39 new schools or additions constructed from 1951 to 1973 and

all 21 built between 1964 and 1973 opened either predominantly white or predominantly black (App. p. 123). These bare facts alone were sufficient to raise the presumption of segregative intent. The Court of Appeals held that the presumption was not rebutted by the School District's evidence that this construction was entirely consistent with its neighborhood school policy, since the Court of Appeals was unpersuaded that there really was a neighborhood school policy, at least in regard to black schools and those on the fringe of the black population area (App. p. 124).

B. The District Court

The District Court found that each of the buildings or additions which opened between 1953 and 1971 was built either to cope with increased enrollment or as a replacement for an older inadequate facility (App. p. 92). It also examined evidence as to the reasons for building each of these facilities and concluded that the placement of these buildings was consistent with the neighborhood school policy of the School District and thus that there was no showing of segregative intent (App. p. 92).

V. The Condition of Technical High School

A. The Court of Appeals

The Court of Appeals found that Technical High School was 96% black in the 1973-74 school year with 710 students and a capacity for 2,475 students (App. pp. 124-25). It held that the inevitable consequence of (1) Technical's joint attendance zone with Central High, (2) the unusually large number of special education students at Technical, (3) the deleting of attractive vocational

courses from the curriculum at Technical, (4) the large unused capacity at Technical, and (5) assigning most black high school teachers to Technical was to identify it as a black school (App. p. 128). The presumption of segregative intent therefore arose, and the Court of Appeals concluded that it was not rebutted (App. p. 129).

B. The District Court

Though not specifically referred to in the District Court's opinion, the record reveals that Technical has shared a joint attendance zone with Central since the very beginning of the school district when Technical and Central were the only high schools and Central was the college preparatory school and Technical was the vocational education school. Both Technical and Central are now and always have been open enrollment schools and can be attended by any high school student in the district. The District Court made no findings with respect to the joint attendance zone's segregative effect, perhaps because Central High was, for the relevant time period, a substantially integrated school with a 32% black enrollment for the 1973-74 school year (App. p. 68). Thus, the joint attendance zone did not allow whites zoned to attend Technical to avoid going to school with a substantial number of blacks.

The District Court found that the special education programs at Technical were specifically set up to serve students already there and were not designed to attract special education students from other high schools to attend Technical (App. p. 73). It further found that certain vocational education courses were dropped due to

lack of student demand and that new course offerings were added in an attempt to meet student desires (App. p. 72). The District Court concluded that the record revealed a determination on the part of the School District to upgrade both the physical plant and the quality of education at Technical (App. p. 69). It attributed declining enrollment at Technical to the fact that from the 1930's to the 1950's Technical had the most advanced vocational education program in the school system, that a substantial portion of the students attending Technical did so because of this program, and that in the early 1960's, interest of high school students in vocational education diminished district-wide as greater importance was placed on college preparation (App. p. 72). The District Court made no specific finding concerning the School District's intent in its faculty assignment at Technical. But it did find that in 1972, only 14.6% of the faculty at Technical was black (App. pp. 90-91). Its findings on the reasons for assignment of black faculty in general would be pertinent, however, and would support a finding that black teachers were not assigned to Technical with the purpose of making it a racially identifiable school. The District Court concluded its analysis of the status of Technical by noting that the School District had an active student recruitment program there for both full and part-time students (App. p. 74).

VI. Other Areas

The District Court's findings that the School District had not discriminated in: (i) the hiring of faculty; (ii) the placement of portable classrooms within the district;

or (iii) the alteration of school attendance zone boundaries were not disturbed or discussed by the Court of Appeals.

VII. Summary

The foregoing comparison demonstrates that as to each of the actions or combination of actions which the Court of Appeals isolated and found had a foreseeable consequence of maintaining or causing racial separation, the District Court carefully inquired into the purpose behind the action or inactions. The District Court then considered all of the evidence in the record and concluded that the Plaintiffs had not sustained their burden of proving that the School District acted with intent to segregate. The Court of Appeals, on the other hand, focused upon particular School District actions and omissions having segregative effects, and based upon its standard which shifted the burden of proof, found that the School District had not met its burden of proving that segregative intent was not among its motives in engaging in these actions or omissions. The dispute before this Court, then, is focused upon the proper standard for ascertaining intent to segregate in school desegregation cases arising in school districts where segregation has not been mandated by statute or local ordinance.

REASONS FOR GRANTING THE WRIT

I.

The Legal Standard Determining Intent

The Eighth Circuit, in grappling with the standards applicable to the proof of intent in school desegregation cases, has formulated a standard which, in practical effect, eliminates the *Keyes* requirement of purpose or intent to segregate and conflicts with Rule 301 of the Federal Rules of Evidence. The proper standard for proof of intent is the focus of current school desegregation litigation, and several courts of appeals have attempted, with a notable lack of harmony, to state applicable rules. The resulting turmoil in the law and the conflict among the circuits in the wake of *Keyes* now requires resolution by this Court. The different conclusions reached by the courts below in this case resulted from different legal standards. Therefore, the issue of the proper standard is clearly posed by this case.

A. The Standard Employed by the Eighth Circuit is in Clear Conflict with Keyes.

The principal question presented by this case is whether the *Keyes* requirement of intentional segregation remains the law.

In *Keyes* this Court held that the differentiating factor between de facto and de jure segregation is "purpose or intent to segregate." *Keyes* did not focus on the standard governing initial proof of "purpose or intent to segregate." Rather the Court held that, after the plaintiffs had borne their initial burden of proving

an intentional program of segregation affecting a substantial portion of the school district, a presumption of segregative intent as to the remaining segregated schools would arise.

In contrast, the Eighth Circuit legal standard is:

> ". . . a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation. When that presumption arises, the burden shifts to the defendants to establish that 'segregative intent was not among the factors that motivated their actions.'" (App. pp. 107-108).

This legal standard conflicts with *Keyes* in two respects: First, it interjects a shift in the burden of proof to the defendant on the question of segregative intent prior to a finding that the plaintiff had carried that burden as to a meaningful portion of the school district. Second, this standard effectively eliminates the requirement of proof of segregative intent in school desegregation cases.

What is at issue in this case is proof of segregative intent in the first instance. Although the presumption employed by the Eighth Circuit is similar to that employed by this Court in *Keyes,* the timing of its interjection is a crucial difference. This Court's timing was supported by the principle that evidence of the commission of *proved* similar and related offenses "tends to show a consistent pattern of conduct highly relevant to the issue of intent." This principle lends no support to the Eighth Circuit's use of the presumption because there

are no proved similar or related offenses to make the principle applicable, and it is only when racial motivation is shown to be the norm rather than the exception that a shift of the burden on intent is justified.

The significance of shifting the burden prematurely can be demonstrated by the ease with which the presumption is triggered and the extreme difficulty of proving a negative proposition regarding intent. The ease of triggering the presumption may be shown by asking either of two questions: (1) Did acts taken by a school district have as one of their foreseeable effects the bringing about or continuance of racially imbalanced schools; or (2) Were acts omitted by a school district which could have had as one of their effects the alleviation of racially imbalanced schools. If the answer to either question is in the affirmative, the presumption will arise.

School authorities can be charged with knowledge of the racial balance effects of any given pupil assignment policy. Thus, any particular pupil assignment policy which results in racial imbalance does so foreseeably. Since school authorities have the power of pupil assignment, they have the power, if transportation is utilized, to adopt a policy which will result in racially balanced schools. Accordingly, the adoption of any policy which results in racial imbalance, or the omission to adopt instead a racial balance transportation policy, will trigger the presumption. The Eighth Circuit presumption will arise in every school district in this country where racial imbalance exists in the schools.

Once the Eighth Circuit's presumption arises, the defendant assumes the burden of proving a negative

proposition. That is, it must show that not one of its intentions was to cause or maintain segregation. Proof of a negative proposition—especially one regarding intentions—is notoriously and obviously difficult. According to at least one court of appeals, this burden can be met only by a "positive showing that defendants acted with integrative intent." *Morgan v. Kerrigan,* 509 F. 2d 580, 594, n. 21 (1st Cir. 1974). Certainly, evidence by the defendant tending to show that its actions had effects other than causing or maintaining racial separation would not satisfy this burden since the logical thrust of such evidence would simply be that some other intention was also *one* of the factors that motivated the defendant's actions. The defendant would still be faced with the presumptive inference from a segregative effect that *one* of the factors motivating its actions was the desire to cause or maintain racial separation. Therefore, as a practical matter, the presumption employed by the Eighth Circuit is irrebuttable. Thus, under the standard the only burden of proof remaining on the plaintiff in a school desegregation case is to establish a racial imbalance effect which was foreseeably caused or maintained by school board action or inaction. Any requirement of proving segregative intent is eliminated.

The constitutional implications of the Eighth Circuit standard are profound. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), the Court held that school boards have no affirmative obligation to integrate unless they intentionally caused segregation. Under the Eighth Circuit standard, the only way of avoiding a finding of intentional segregation, with its accompanying affirmative action remedy, is for school author-

ities to prove that they took affirmative integrative actions in the first place. Such a standard emasculates the principles of *Swann* and *Keyes* and stands the substantive law on its head.

Procedural engineering is used as a predicate for massive remedial consequences, and introduces into the Equal Protection Clause an affirmative obligation of integrative state action. Procedural requirements which nullify substantive law are not acceptable, even in civil rights cases. This Court soundly disapproved a like standard adopted by the Eighth Circuit in a Title VII employment case, *McDonnell Douglas Corp. v. Green,* 411 U. S. 792 (1973). It should also be rejected in school desegregation cases.

The practical effects of the Eighth Circuit standard are equally far-reaching. Its presumption will be triggered wherever there are racially imbalanced schools. The presumption is, in practical effect, irrebuttable. Therefore, every northern and western school system which has racially imbalanced schools will be subject to an affirmative obligation to desegregate, "root and branch."

B. There is Conflict in the Courts of Appeals on the Proper Standard for Ascertaining Segregative Intent.

Since *Keyes,* the focus of "northern and western" school desegregation litigation has been on the question of what sort of proof is necessary to establish an intention or purpose to segregate and how the burden of proof on this issue is to be allocated. Six Circuit Courts of Appeals have considered these questions and have come to varying conclusions.

The Ninth Circuit[1] and one panel of the Sixth Circuit[2] have employed a standard similar to that adopted by the District Court here. These cases require the plaintiff, unaided by any presumption in the first instance, to prove racially discriminatory motivation for school district action before a court may find a constitutional violation. The Sixth Circuit in *Higgins* explicitly recognized that segregative intent may be inferred from the foreseeable consequences of a school district's actions,[3] but held mere proof that school district actions had a foreseeably segregative effect was not sufficient to compel a finding of segregative intent.[4] The Ninth Circuit emphasized the role of the trial court in determining segregative intent because the credibility of school officials' testimony is crucial on this question.[5] The Ninth Circuit, like the District Court here, held that segregative effects are not determinative on the question of intent.

The First Circuit, although less clearly than the Ninth Circuit, also appears to have approved a standard similar to that applied by the District Court in this case because it recognized that the *Keyes* burden-shifting presumption did not apply until the district court had made

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1. **Berkelman v. San Francisco Unified School District,** 501 F. 2d 1264 (9th Cir. 1974); **Johnson v. San Francisco Unified School District,** 500 F. 2d 349 (9th Cir. 1974); and **Soria v. Oxnard School District Board of Trustees,** 488 F. 2d 579 (9th Cir. 1973).
2. **Higgins v. Board of Education of City of Grand Rapids,** 508 F. 2d 779 (6th Cir. 1974).
3. **Id.** at 793.
4. **Id.** at 787-88, 793.
5. **Soria v. Oxnard School District Board of Trustees,** 488 F. 2d at 588.

independent findings of intentional segregation in a significant portion of the school district.[6] That Circuit further found that the district court correctly inferred segregative intent because it relied upon the permissible inference of intent from consciously consummated acts and because that inferred intent was consistent with the expressed motivation.[7]

The Second Circuit has done explicitly what the Eighth Circuit has done here implicitly, by holding that proof of lack of segregative intent is irrelevant once it is established that school district actions and omissions had the natural and foreseeable consequence of causing educational segregation.[8]

The Fifth Circuit has now held that its earlier decision eliminating the distinction between de facto and de jure segregation[9] was in error and has held that *Keyes* requires proof of segregative intent.[10] That Circuit then reversed the district court's finding of no segregative intent on the ground that the finding was clearly erroneous. The Fifth Circuit based this determination solely upon the segregative result of the adoption of a neighborhood school policy without any reference to the

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6. **Morgan v. Kerrigan, 509 F. 2d 580, 594 (1st Cir. 1974).**
7. **Id. at 592.**
8. **Hart v. The Community School Board of Education, New York School District No. 21, 512 F. 2d 37, 51 (2nd Cir. 1975).**
9. **Cisneros v. Corpus Christi Independent School District, 467 F. 2d 142 (5th Cir. 1972) (en banc).**
10. **Morales v. Shannon, No. 73-3096 (5th Cir., filed July 23, 1975).**

district court's extensive analysis of the reasons for the adoption of this policy.

Another panel of the Sixth Circuit[11] has taken a position similar to that adopted by the Eighth Circuit here. The standards are identical in requiring a shift of the burden of proof to the school district upon a showing of racially segregative effects. This Panel of the Sixth Circuit does not, however, explicitly place upon the school district the burden of proving a negative proposition. Rather, it requires that the defendants "affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies."[12]

The differing approaches taken by the Courts of Appeals and the disarray of the law on this most vital question speak for the Court's guidance now to clarify the proper role of proof of segregative intent in school desegregation cases and the proper allocation of the burden of proof as to intent. The differences in standard are not of academic interest only. They have brought about opposite results in the face of similar facts as is shown by the Eighth Circuit's decision in this case and the Sixth Circuit's decision in *Higgins*, and they have brought about opposite results on identical facts as is shown by the decisions of the District Court and the Eighth Circuit in this case.

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11. **Oliver v. Michigan State Board of Education, 508 F. 2d 178 (6th Cir. 1974).**
12. **Id. at 182.**

C. The Standard Employed by the Court of Appeals is in Conflict with Rule 301 of the Federal Rules of Evidence.

A clarification of the law governing proof of segregative intent in school desegregation cases must take into account the new Federal Rules of Evidence because evidentiary principles have become inextricably intertwined with the substantive law in this area. This case properly raises the issue of the standards governing proof of segregative intent. Therefore, it is appropriate that consideration be given to these Rules here. Rule 301 of the Federal Rules of Evidence, passed by Congress on January 2, 1975, and effective July 1, 1975, states as follows:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."[13]

As to the allocation of the burden of proof under its standard, the Eighth Circuit states:

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13. Although Rule 301 did not become effective until eighteen days after the Eighth Circuit opinion in this case, it had been enacted over five months prior to that time. Moreover, Rule 301 simply restates the law in effect in the Eighth Circuit at the time of this opinion, **O'Brien v. Equitable Life Assurance Society of United States**, 212 F. 2d 383 (8th Cir. 1954), and is in accord with the vast weight of other federal authority. **See, e. g., Sabatino v. Curtiss National Bank of Miami Springs**, 446 F. 2d 1046, 1055 (5th Cir. 19[illegible]); **Berenyi v. District Director, Immigration & Naturalization Service**, 352 F. 2d 71, 73 (1st Cir. 1965); **Polizzi v. C. I. R.**, 265 F. 2d 498, 501-502 (6th Cir. 1959); **Contra, Psaty v. United States**, 442 F. 2d 1154, 1160 (3rd Cir. 1971).

> "When that presumption arises, *the burden shifts to the defendants to establish* that 'segregative intent was not among the factors that motivated their actions.'" (Emphasis added.) (App. pp. 107-108.)

The foregoing emphasized language clearly imposes upon the defendant the burden of proof and not merely the burden of going forward with the evidence. In a preliminary form Rule 301 gave to presumptions substantially the same effect as does the Eighth Circuit standard. Rule 301 was revised to its present form because of the Congressional intent that a presumption not result in a change in the burden of proof—but merely a change in the burden of going forward with evidence.[14] The result is that the Eighth Circuit standard is in clear conflict with the requirements and intent of Rule 301.

The conflict has basic significance. Rule 301 restates the sound, long-established principle that the fact-finder in dealing with conflicting evidence must, in any event, be persuaded by the plaintiff's case. An inference cannot, because labeled a "presumption," be treated as conclusive on the exercise of the fact-finder's judgment. The Eighth Circuit standard does not similarly regard the role of the trial court. Its presumption was conclusive on the fact-finder as demonstrated by the failure to remand the case to the District Court to make findings on the intent question in light of the creation of the presumption. Further indication of the conclusive character of the presumption is that non-racial explanations accepted by the District Court as genuine, and testimony that no segregative intent

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14. S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974); **see also** Historical Note, 28 U. S. C. A. Federal Rules of Evidence at 66-67.

existed, were not deemed under the Eighth Circuit standard as even raising an issue of fact on the intent question.

Thus, judicial efforts to bend over backwards to accommodate school desegregation plaintiffs have culminated in a legal standard which fictionalizes the intent requirement, nullifies the traditional responsibility of the trial court to determine intent, and conflicts with the Federal Rules of Evidence in the process.

II.

The Issuance of Remedy Guidelines by a Court of Appeals in the First Instance Conflicts With Settled Precedent of this Court

The second aspect of this case requiring the Court's attention is the unprecedented decision of the Court of Appeals establishing in the first instance detailed guidelines to govern the desegregation plan. These guidelines establish: the persons and groups with whom the school board is required to work in formulating a desegregation plan; the timetables for submission and implementation of phases of the plan; a prohibition against the reassignment of students currently attending integrated schools; prohibitions against increasing black enrollment above twenty-five percent in schools where the black enrollment is presently below twenty-five percent; racial balance requirements for schools which are currently majority black schools; a prohibition of any transfers which have the effect of increasing the segregated nature of either the sending or receiving schools; and various other requirements (App. pp. 129-33).

These guidelines, which presumably the Plaintiffs will assert as res judicata if the Court does not accept this case for review, were issued by the Eighth Circuit despite the facts that:

1. The trial of this case in the District Court did not involve the question of the proper or appropriate remedy;

2. The pre-trial order which listed the issues for trial did not list any issue as to remedy or remedy guidelines, and no evidence, arguments or briefs were presented on these issues in the District Court;

3. The School District has never submitted, and the District Court has never reviewed, any plan or proposals for guidelines; and

4. The question of the proper remedy was not addressed by any of the parties in the briefs filed with the Court of Appeals, nor were any suggestions as to appropriate guidelines made at oral argument.

Since *Brown v. Board of Education*, 349 U.S. 294 (1955), this Court has placed the primary responsibility upon the local school officials to develop a plan which accords with governing constitutional principles and on the district court in the first instance to review the plan proposed by the school board. The court of appeals has a role only if the district court's review of the school board's plan is disputed by one of the parties and appealed. Moreover, this Court has emphasized that there is no universal answer to the complex problems of school desegregation and has recognized the necessity of allow-

ing the district court to mold each decree to the circumstances of the particular case. Flexibility rather than rigidity has characterized this Court's approach to school desegregation remedies. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

In light of the passage of the Equal Educational Opportunity Act of 1974, 20 U. S. C. § 1701 et seq., special consideration must now be given to minimizing transportation of pupils, and specific factual findings must be made as conditions precedent to any large scale transportation remedy. The Court of Appeals did not make findings on these statutory requirements.

The guidelines announced in the Eighth Circuit opinion were not advocated by any party but were conceived by the court on its own initiative. Therefore, the Court of Appeals was without benefit of the views of the parties as to the legality, desirability or practical effect of its guidelines.

The imposition of rigid constitutional solutions which confine both the school district and the district court in dealing with a problem of extreme complexity is particularly unwise in an area where knowledge is still accumulating and where solutions advocated by experts yesterday are acknowledged as folly today. At the very least, the district court should be permitted an open mind in judging the constitutionality of a plan proposed by the school district. It is the district court, and not the appellate court, that can best reconcile, at least in the first instance, the requirements of the Constitution and the legitimate educational goals of the community. The imposition by a court of appeals of inflexible remedy guidelines at this

stage in the litigation so radically departs from settled precedent that it suggests review by this Court is necessary and appropriate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

KENNETH B. HOLM
GERALD P. LAUGHLIN
MICHAEL G. LESSMANN
DAVID M. PEDERSEN
BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & HAGGART
1500 Woodmen Tower
Omaha, Nebraska 68102
Attorneys for Petitioners

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. § 2000c-6:

> (a) Whenever the Attorney General receives a complaint in writing—
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> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .
>
> . . .
>
> and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board . . . and after certifying that he is satisfied that such board . . . has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the

> United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.
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> (b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 301 of the Federal Rules of Evidence:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.